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8 **UNITED STATES DISTRICT COURT**
9 **SOUTHERN DISTRICT OF CALIFORNIA**
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11 VICTOR NUNEZ MUNOZ,
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Petitioner,

v.

IMPERIAL COUNTY JAIL, et al.,

Respondents.

Civil No. 11-0888 H (NLS)

**ORDER DISMISSING CASE
WITHOUT PREJUDICE AND WITH
LEAVE TO AMEND**

Petitioner, a state prisoner proceeding pro se, has filed a Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254.

FAILURE TO SATISFY FILING FEE REQUIREMENT

Petitioner has failed to pay the \$5.00 filing fee and has failed to move to proceed in forma pauperis. This Court cannot proceed until Petitioner has either paid the \$5.00 filing fee or qualified to proceed in forma pauperis. *See* Rule 3(a), 28 U.S.C. foll. § 2254.

FAILURE TO NAME PROPER RESPONDENT

Review of the Petition reveals that Petitioner has failed to name a proper respondent. On federal habeas, a state prisoner must name the state officer having custody of him as the respondent. *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 894 (9th Cir. 1996) (citing Rule 2(a), 28 U.S.C. foll. § 2254). Federal courts lack personal jurisdiction when a habeas petition fails to name a proper respondent. *See id.*

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1 “[T]he ‘state officer having custody’ [is] ‘. . . the warden of the institution in which the
 2 petitioner is incarcerated’” *Id.* (quoting Rule 2(a), 28 U.S.C. foll. § 2254 advisory
 3 committee’s note). If “a petitioner is in custody due to the state action he is challenging, ‘[t]he
 4 named respondent shall be the state officer who has official custody of the petitioner’” *Id.*
 5 (quoting Rule 2, 28 U.S.C. foll. § 2254 advisory committee’s note). A long standing rule in the
 6 Ninth Circuit holds “that a petitioner may not seek [a writ of] habeas corpus against the State
 7 under . . . [whose] authority . . . the petitioner is in custody. The actual person who is [the]
 8 custodian [of the petitioner] must be the respondent.” *Ashley v. Washington*, 394 F.2d 125, 126
 9 (9th Cir. 1968). This requirement exists because a writ of habeas corpus acts upon the custodian
 10 of the state prisoner, the person who will produce “the body” if directed to do so by the Court.
 11 “Both the warden of a California prison and the Director of Corrections for California have the
 12 power to produce the prisoner.” *Ortiz-Sandoval*, 81 F.3d at 895.

13 Here, Petitioner has incorrectly named “Imperial County Jail, The People, Mrs. Clayton,
 14 Mr. Pamphrey, Mr. R. Ortega, Mr. Garcia, etc.,” as Respondent. In order for this Court to
 15 entertain the Petition filed in this action, Petitioner must name the warden in charge of the
 16 correctional facility in which Petitioner is presently confined. *Brittingham v. United States*, 982
 17 F.2d 378, 379 (9th Cir. 1992) (per curiam).

18 **FAILURE TO STATE A COGNIZABLE FEDERAL CLAIM**

19 Additionally, in accordance with Rule 4 of the rules governing § 2254 cases, Petitioner
 20 has failed to allege that his state court conviction or sentence violates the Constitution of the
 21 United States.

22 Title 28, United States Code, § 2254(a), sets forth the following scope of review for
 23 federal habeas corpus claims:

24 The Supreme Court, a Justice thereof, a circuit judge, or a district
 25 court shall entertain an application for a writ of habeas corpus in
 26 behalf of a person in custody pursuant to the judgment of a State
 court only on the ground that he is in custody in violation of the
Constitution or laws or treaties of the United States.

27 28 U.S.C. § 2254(a) (emphasis added). *See Hernandez v. Ylst*, 930 F.2d 714, 719 (9th Cir.
 28 1991); *Mannhalt v. Reed*, 847 F.2d 576, 579 (9th Cir. 1988); *Kealohapauole v. Shimoda*, 800

1 F.2d 1463, 1464-65 (9th Cir. 1986). Thus, to present a cognizable federal habeas corpus claim
 2 under § 2254, a state prisoner must allege both that he is in custody pursuant to a “judgment of
 3 a State court,” and that he is in custody in “violation of the Constitution or laws or treaties of the
 4 United States.” *See* 28 U.S.C. § 2254(a).

5 Here, Petitioner states the following as claim one, “Health and safety welfare, corrections
 6 Imperial County California Jail, medical documents and record supporting. Went to Chino State
 7 Prison and back to county jail Imperial Valley Corrections, the law of United States of
 8 America.” (ECF No. 1 at 8.) As to claim two, he states: “Case, warrant, release, inmate custody.
 9 They came to my cell and got all my stuff now I send you this copies it up to you to help me.”
 10 (*Id.* at 7.) As to claim three, he states: “Rules and regulation, admissions procedure, leaving
 11 quarters, documents and papers.” (*Id.* at 6.) As to claim four, he states: “Staff, hold, parole,
 12 petty thief, possession of drugs wee in jail, narcotic testing, the people, judge and lawyer. On
 13 record, I want to see how they did that we got rights by law of the Petitioner, Victor Nunez
 14 Munoz, etc. location.” (*Id.* at 9.) In no way does Petitioner claim he is “in custody in violation
 15 of the Constitution or laws or treaties of the United States.” 28 U.S.C. § 2254.

16 Further, the Court notes that Petitioner cannot simply amend his Petition to state a federal
 17 habeas claim and then refile the amended petition in this case. He must exhaust state judicial
 18 remedies before bringing his claims via federal habeas. State prisoners who wish to challenge
 19 their state court conviction must first exhaust state judicial remedies. 28 U.S.C. § 2254(b), (c);
 20 *Granberry v. Greer*, 481 U.S. 129, 133-34 (1987). To exhaust state judicial remedies, a
 21 California state prisoner must present the California Supreme Court with a fair opportunity to
 22 rule on the merits of every issue raised in his or her federal habeas petition. *See* 28 U.S.C.
 23 § 2254(b), (c); *Granberry*, 481 U.S. at 133-34. Moreover, to properly exhaust state court
 24 judicial remedies a petitioner must allege, in state court, how one or more of his or her federal
 25 rights have been violated. The Supreme Court in *Duncan v. Henry*, 513 U.S. 364 (1995)
 26 reasoned: “If state courts are to be given the opportunity to correct alleged violations of
 27 prisoners’ federal rights, they must surely be alerted to the fact that the prisoners are asserting
 28 claims under the United States Constitution.” *Id.* at 365-66 (emphasis added). For example,

1 “[i]f a habeas petitioner wishes to claim that an evidentiary ruling at a state court trial denied him
 2 the due process of law guaranteed by the Fourteenth Amendment, he must say so, not only in
 3 federal court, but in state court.” *Id.* (emphasis added).

4 Additionally, the Court cautions Petitioner that under the Antiterrorism and Effective
 5 Death Penalty Act of 1996 (Act), signed into law on April 24, 1996, a one-year period of
 6 limitation shall apply to a petition for a writ of habeas corpus by a person in custody pursuant
 7 to the judgment of a State court. The limitation period shall run from the latest of:

8 (A) the date on which the judgment became final by the
 9 conclusion of direct review or the expiration of the time for seeking
 such review;

10 (B) the date on which the impediment to filing an application
 11 created by State action in violation of the Constitution or laws of the
 United States is removed, if the applicant was prevented from filing
 by such State action;

12 (C) the date on which the constitutional right asserted was
 13 initially recognized by the Supreme Court, if the right has been
 14 newly recognized by the Supreme Court and made retroactively
 applicable to cases on collateral review; or

15 (D) the date on which the factual predicate of the claim or
 16 claims presented could have been discovered through the exercise
 of due diligence.

17 28 U.S.C. § 2244(d)(1)(A)-(D) (West Supp. 2002).

18 The Court also notes that the statute of limitations does not run while a properly filed state
 19 habeas corpus petition is pending. 28 U.S.C. § 2244(d)(2); *see Nino v. Galaza*, 183 F.3d 1003,
 20 1006 (9th Cir. 1999), *cert. denied*, 529 U.S. 1104 (2000). *But see Artuz v. Bennett*, 531 U.S. 4,
 21 8 (2000) (holding that “an application is ‘properly filed’ when its delivery and acceptance [by
 22 the appropriate court officer for placement into the record] are in compliance with the applicable
 23 laws and rules governing filings.”). However, absent some other basis for tolling, the statute of
 24 limitations does run while a federal habeas petition is pending. *Duncan v. Walker*, 533 U.S. 167,
 25 181-82 (2001).

26 Petitioner’s allegations suggest he may be seeking to challenge the conditions of his
 27 confinement rather than the validity of his state court conviction. Such challenges are brought
 28 pursuant to the Civil Rights Act, 42 U.S.C. § 1983. *See Preiser v. Rodriguez*, 411 U.S. 475,

1 488-500 (1973). When a state prisoner is challenging the very fact or duration of his physical
 2 imprisonment, and the relief he seeks is a determination that he is entitled to immediate release
 3 or a speedier release from that imprisonment, his sole federal remedy is a writ of habeas corpus.
 4 *Id.* at 500. On the other hand, a § 1983 action is a proper remedy for a state prisoner who is
 5 making a constitutional challenge to the conditions of his prison life, but not to the fact or length
 6 of his custody. *Id.* at 499; *McIntosh v. United States Parole Comm'n*, 115 F.3d 809, 811-12
 7 (10th Cir. 1997). It appears that Petitioner may be seeking to challenge the conditions of his
 8 prison life, but not the fact or length of his custody. Thus, Petitioner has not stated a cognizable
 9 habeas claim pursuant to § 2254.

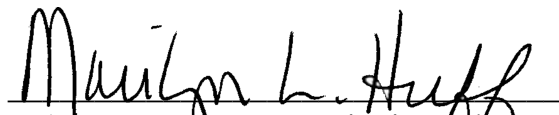
10 CONCLUSION

11 For all the foregoing reasons, the Court **DISMISSES** the Petition without prejudice and
 12 with leave to amend. To have this case reopened as a 28 U.S.C. § 2254 habeas corpus petition,
 13 Petitioner must, **no later than July 5, 2011**: (1) pay the \$5.00 filing fee **OR** submit adequate
 14 proof of his inability to pay the fee; **AND** (2) file a First Amended Petition that cures the
 15 pleading deficiencies outlined in this Order.

16 If Petitioner does not seek to challenge the validity of his state court conviction or the
 17 duration of his confinement but rather seeks to challenge the conditions of his confinement, he
 18 must file a new civil rights complaint pursuant to 42 U.S.C. § 1983 which will be given a new
 19 case number. *The Clerk of Court is directed to mail Petitioner a blank Motion to Proceed in*
 20 *Forma Pauperis form, a blank First Amended Petition form, and a blank Civil Rights*
 21 *Complaint Pursuant to 42 U.S.C. § 1983 form together with a copy of this Order.*

22 IT IS SO ORDERED.

23 Dated: April 28, 2011

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 25 MARILYN L. HUFF, District Judge
 26 UNITED STATES DISTRICT COURT
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